IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDCITION

CRIMINAL APPEAL NO.603 OF 1989

The State of Maharashtra .. **Appellant (Orig. Complainant)**

Versus

1. **Shankar Babu Bane,**
   1/3, Meghwadi,
   Dr. S.S. Rao Road,
   Lalbaug,
   Bombay-400012.

2. **Anil Krishnarao Awarsekar,**
   Urmila Apartment, 'A' Wing,
   5th Floor, Block No.50,
   Kol. Dongri, Sahar Road,
   Andheri, Bombay-69.

3. **Shankar Rayappa Kaulalgi,**
   A-6, Shivashati Co-op. Hsg.
   Soc. Vileparle, Mumbai-56.

4. **Dattatraya Mankoba Bhambure,**
   New Siddharth Nagar, Div.III,
   Bldg. No.3, Block No.38,
   1st floor, Police Station Road
   Goregaon, Bombay-62.

5. **Santosh Takchand Kalani**
   Plot No.A/12, Iris Park,
   Near Chandan Cinema,
   Santacruz (W), Bombay.

6. **Mohamad Amin Amanulla,**
   8, Mistry House, 1st floor,
   300, S.V. Road, Near Post
   Office, Jogeshwari (W),
   Bombay-400102. **... Respondents (Orig. Accused)**

Dr. F.R. Shaikh, APP for the State

Shri R.M. Agarwal, Sr. Adv. with Girish R.Agarwal for Respondent Nos. 3 and 4.

Shri V.I. Pajwani with Shri H.H. Ponda for Respondent

Nos.1 and 2.

CORAM : D.G. DESHPANDE,
& S.R. SATHE, JJ.
DATED : 10th JANUARY, 2007

ORAL JUDGEMENT :- (PER S.R.SATHE,J.)

1. The State of Maharashtra has preferred this appeal against the judgement and order passed by the Special Judge, Greater Bombay in Special Case No.27 of 1984 whereby all the accused i.e. accused Nos. 1 to 6 were acquitted of the offences punishable under Sections 120-B, 409, 466, 467, 477-A and 201 of IPC as well as under Sections 5(1)(c) and Section 5(a)(d) of the Prevention of Corruption Act r/w. section 109 of IPC and under Clause-19 under section 3 r/w. 7 of the Essential Commodities Act.

2. In order to appreciate the facts of the case, it would be worthwhile to see the position of the accused Nos. 1 to 6 at the relevant time. Accused No.1 was working as Transport Contractor. Accused Nos. 2 to 4 were the public officers working in the public works department and as such, they were charged for the offences punishable under provisions of Prevention of Corruption Act. The accused No.5 was the representative of one Kalani to whom the contract of raising floor over mess and canteen block at Naigaon was given by

P.W.D. At Plot No.4 Naigaon, the work of special repair of 'D' and 'E' buildings and water proofing work was being carried by Continental Water Proofing Company and at the relevant time, accused No.6 was the representative of that said company who was looking after the said water proofing work.

3. The brief facts relevant for the decision of this appeal are as under :-

In 1982, one Sharad Trimbak Rale was working as Inspector of Police in Anti Corruption Bureau. On 11/06/1982, he was asked by his Superior Officer to inquire into certain incidents occurred at U-1 barracks godown at Worli. In those barracks cement belonging to PWD was stored and there was some news item published in the newspaper regarding misappropriation of that cement. During the said inquiry, PI Rale found that there was misappropriation of cement issued on 29/03/1982. He, therefore, lodged complaint alleging that the accused Nos. 1 to 6 conspired together to misappropriate 200 cement bags worth Rs. 8806.50 and for that purpose, committed forgery in respect of some documents and also destroyed some documents.

4. Admittedly, at the relevant time, there was

restriction on sale and purchase of cement in open market. When a contract of any government work was given to a private contractor, the government used to supply cement to the said contractor for use of the said cement at the Government site of which contract was given. For that purpose, it was necessary to prepare an indent of the cement required for the work. The said indent used to be under the signature of concerned Dy.Engineer. Accordingly, the indent in respect of said raising of floor over the mess and canteen was bearing No.N/193 dated 23/3/1982 and was signed by accused No.2. The quantity asked for the said indent was 100 bags. The other indents in respect of the work carried out at 'D' and 'E' Buildings was bearing No.203 and was in respect of 200 bags. As per the procedure, it was necessary for the Deputy Engineer to mention the names of the authorized representative who would collect the cement. Accordingly, on the above mentioned two indents name of accused Nos. 3 and 4 were mentioned. Indent was finally required to be sanctioned by the Executive Engineer and when the said indent is sanctioned by the Executive Engineer it used to go to the store branch and then the cement used to be issued to the representative of the contractor.

5. According to the Prosecution, the above mentioned two indents were received at the godown situated at U-1 barracks belonging to the PWD and 200 bags of cement (100 for each indent) were delivered on 29/03/1982. The 200 bags were transported by truck bearing No. BMQ-3615. However, in stead of delivering the said cement bags at the government site, the said cement was delivered at the site of Brillanto Textile MIDC Mahakali, Bombay. It is alleged that this transaction took place through broker one Laxmilal Jain, a dealer in building material having its firm at Kurla. Consignment of the said 200 bags was obtained by Jain through accused No.1 Bane who arranged the cement from the PWD officials. It is alleged that in order to suppress this illegal transaction, accused persons even destroyed the Cement Consumption Register maintained at the site and other relevant documents and thus committed offences in question.

6. During the investigation, police recorded statements of number of witnesses and also attached certain documents. After completion of the investigation, charge-sheet was submitted against the accused for the offences mentioned above. Learned Special Judge framed charge Exh-9 against the accused for the offences mentioned above.

7. The charge was read over and explained to the accused. All the accused pleaded not guilty and claimed to be tried. From the suggestions put to the PW-3 and from the statements of the accused recorded under section 313 of Cr.P.C., it appears that defence of the accused was that the cement issued under the above mentioned two indents was consumed at the site for which it was meant. It is also the defence of the contractor that PWD has even paid the bills of the said work from which it is clear that they have also accepted that the cement issued for the work in question has been consumed by the Contractor for the said work. All the accused therefore submitted that they have not committed any offence.

8. In order to prove the prosecution case, the prosecution examined as many as 15 witnesses and also

produced several documents. After considering the entire evidence on record the learned Trial Judge came to the conclusion that the prosecution has failed to adduce sufficient evidence to show that 200 bags of cement dispatched on 29/03/1982 was diverted to the site Brillanto Textile Mills as alleged. The testimony of the main witnesses namely Rammurat and Rahematulla and Bhagwandas is not consistent and it can not be accepted. The learned Trial Court therefore gave the benefit of doubt to the accused persons and acquitted all the accused of the charges framed against them.

9. Being aggrieved by the said order the State of Maharashtra has filed the present appeal. In this appeal before us, the learned APP submitted that learned Trial Judge has not properly appreciated the evidence of witness Rammurat and Rahematulla and having once come to the conclusion that the goods namely 200 cement bags were delivered from the PWD godown and loaded in the truck of Rammurat and Rematulla, the evidence of those witnesses should have been accepted and it should have been held that the offence is proved by the prosecution.

10. As against this, Shri Agarwal learned Senior

Advocate for the accused submitted that two important witnesses of the prosecution namely Suresh Jethpal and Laxmilal Jain i.e. Exh-73 and Exh-66 respectively have turned hostile. The evidence of Rammurat and Rahematulla is also not trustworthy and it is proved that the final bill in respect of work in question where the cement bags were to be utilized has been cleared by the PWD. It is to be presumed that the cement in question must have been utilized for the work for which it was dispatched. He, therefore submitted that there is no necessity to interfere in the findings recorded by the learned Trial Judge. He, therefore, submitted that the appeal be dismissed.

11. It is not in dispute that at the relevant time, there was restrictions on sale and purchase of cement bags in open market. It is also an admitted fact that it was the practice of the PWD to provide cement bags to the contractor in respect of the work which has been assigned by the PWD to the Contractor and then to deduct the amount of the said cement from the total bill of the Contractor. Admittedly, in the instant case as per the procedure the Contractor as well as the concerned engineer at the site had submitted indent

No.193 (Exh-21) and indent No. 203 (Exh-25) and thereby asked 200 bags of cement. Not only that but it is also not in dispute that accordingly as per the requisition, 200 bags of cement were delivered from the PWD godown situated at U-1 barracks and the said bags were loaded in the truck bearing No.BMQ 3615 owned by PW-5 Rammurat and PW-6 Rahematulla Shaikh. The main and the material question is whether the Prosecution has proved beyond reasonable doubt that the said 200 bags of cement was not utilized at the Naigaon Site for which it was dispatched but the same was utilized at some other place. According to the prosecution the said bags were used at Brillanto Textile Mills where the work was carried out by one Bhagwandas (PW-8).

12. In the above mentioned circumstances, it was necessary for the prosecution to adduce cogent evidence to show that the 200 bags of cement loaded in the truck No.BMQ 3615 on 29/03/1982 were actually delivered at a different site or at least to show that the said bags were not delivered at the site for which the same were allotted or delivered. Naturally, for that purpose the prosecution has mainly relied on the evidence of Rammurat and Rahematulla Shaikh. They are the owners and drivers of the said truck. Not only that but it is

an admitted fact that when the said bags were loaded in their trucks, delivery challan was prepared and the said challan is signed by the said drivers. However, it is pertinent to note that on the delivery challan, the place where the goods or cement bags were to be delivered is shown as Naigaon while Brillanto Textile Mill is admittedly situated at MIDC, Andheri. So from this, one thing is certain that the person who had delivered the goods or the cement bags had directed the drivers to unload the same at Naigaon and not at Andheri. Both the drivers have not at all specifically stated that at the relevant time, they were orally instructed by any of the accused persons to deliver the said bags at the site of Brillanto Textile Mills. There are lot of inconsistencies and discrepancies in the evidence of those two witnesses. What is more to be noted is that when the IO had asked them to point out the place where they delivered the goods i.e. cement bags in question, they were unable to do so. Not only that but from their evidence, it is also very clear that the accused Nos. 1, 2 and 4 to 6 were not at all present when the cement bags in question were loaded in the said truck.

13. It is worth to note that the above mentioned

two drivers have admitted that a logbook is maintained in the truck and it indicates the places at which the truck had gone during the day and the goods delivered at various places, its quantity etc. Though, it has come on record that such logbook was in fact produced before the IO, the said logbook is not at all produced on record. In fact, if the said logbook would have been produced that would have been the best evidence to show that on the given date the truck in question had gone from PWD godown situated at U-1 barracks to Andheri but that has also not happened.

14. If the written document on record goes to show that the direction was to deliver the goods at Naigaon and if the goods are actually delivered not at Naigaon but at some other place by the driver then question arises whether they were party to the alleged conspiracy? why they acted against the direction? While considering this aspect, it is essential to give importance to the arguments of the learned Advocate for the accused when it is submitted that these two witnesses Rammurat and Rahematulla are in fact not independent trustworthy witnesses but they are accomplice. It has come on record that during the investigation, IO had called these witnesses to Police

Station time and again. But he did not record their statements earlier and only after their several visits to Police Station, their statements were recorded. Witness Rammurat has even admitted that at one point of time, IO had given threat that he would also be involved in the offence and his truck will be attached. So, under such circumstances, there is every reason to believe that as result of the said threat the above mentioned two witnesses might have deposed as per the say of the IO. Ofcourse, even if we consider their evidence as it is, the same is not consistent and it is certainly not sufficient to prove beyond reasonable doubt that the cement bags which were loaded in the truck on 29/03/1982 were actually delivered by them to Brillanto Textile Mills on that day at midnight. So, we find that the learned Trial Judge has properly appreciated the evidence of these two witnesses and has rightly held that their testimony is not sufficient to prove the charge levelled against the accused.

15. It must also be noted that though Bhagwandas purchased the cement through witness Suresh and Laxmichand i.e. PW-10 and PW-11. Both these witnesses have turned hostile and as such their evidence is of no use to the prosecution.

16. It must be noted that it was the case of the prosecution that the goods loaded in the truck were directed to be delivered at the site at Naigaon. The prosecution could have produced the stock register etc. maintained at the site. It is tried to be suggested that Cement Consumption Register is maintained at the site but the relevant register was not traced and attempt was made to show that the said register was in fact destroyed by the accused. However, in order to prove that it was destroyed by the accused it was first essential for the prosecution to adduce cogent evidence to show that particular register was actually in the custody of a particular accused and the same was not available with the said accused when called for. Unfortunately, the prosecution has not adduced any convincing evidence to show that the Consumption Register in question was maintained by a particular person and it disappeared from the particular date. On the contrary, it has come on record that whenever final bill is submitted to the Executive Engineer by the Contractor, he is required to produce the Cement Consumption Register as well as other documents and it is only after verification of those documents and ascertaining the fact that the cement in question has

been consumed for the work in question, the final bill is passed by the Executive Engineer. Admittedly, in the instant case, such final bill was produced and it is passed by the Executive Engineer. Naturally, this circumstance is in favour of the accused because it gives rise to a legitimate presumption that the bill must have been passed after verifying all the things. It is not the case of prosecution that the Executive Engineer in this case i.e. PW-7 was also party to the conspiracy. So, under such circumstances when it has come on record that Executive Engineer has passed the bill, it has to be presumed that he must have done after visiting the site, taking measurements and scrutinizing all the documents including the Cement Consumption Register.

17. In the absence of the Cement Consumption Register, the prosecution should have adduced any other cogent evidence to show that particular work which was to be carried out with the use of the cement in question was not actually carried out or that the work that has been carried out is not of the quality which is expected after use of cement for the said work. But no such attempt has been made by the prosecution. So, under such circumstance, when the accused say that the

said cement was received at the site and it has been utilized or consumed for the work for which it was given, it can not be said that the said version is not true or correct and is not possible.

18. After careful scrutiny of the entire prosecution evidence on record we are of the considered view that the learned Trial Judge has taken into consideration each and every aspect of the case and has arrived at the conclusion that the prosecution has failed to adduce sufficient evidence and accused are entitled to the benefit of doubt. We do not think that the view taken by the learned Trial Judge is erroneous or not possible.

19. In this view of matter, the appeal is dismissed.

(D.G. DESHPANDE,J.)

(S.R. SATHE,J.)